

MOHAVE COUNTY BOARD of SUPERVISORS



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January 14, 2019

Via Email and U. S. Mail

Director Thomas Buschatzke
Arizona Department of Water Resources
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Phoenix, AZ 85007
tbuschatzke@azwater.gov

General Manager Theodore C. Cooke
Central Arizona Water Conservation District
P.O. Box 43020
Phoenix, AZ 85080-3020
tcooke@cap-az.com

Ms. Vineetha Kartha, Manager
Arizona Department of Water Resources,
Colorado River Management Section
1110 W. Washington Street, Suite 310
Phoenix, AZ 85007
vkarth@azwater.gov

RE: Mohave County Public Comment and Objection Letter to MVIDD ICS Exhibit dated December 28, 2018

Dear Director Buschatzke, General Manager Cooke and Ms. Kartha:

I write today to express Mohave County's opposition to any approval of the MVIDD ICS (Intentionally Created Surplus) Exhibit, dated December 28, 2018, as written, because the Exhibit will facilitate transfer of Colorado River water away from the River Communities. We are not alone in our opposition and you may recall the opposition letters to the MVIDD Exhibit filed by the Yuma Irrigation District of November 6, 2018 and the North Gila Valley Irrigation & Drainage District also of November 6, 2018. The County proposes that the Exhibit be approved only if it contains a strict prohibition on any ICS water ever being transferred away from the River Communities.

Thank you for providing a public comment period through your Steering Committee process as you work to authorize Arizona to join the Lower Basin Drought Contingency Plan (DCP). We explain our objections below and, of course, will be available to discuss this matter at any time.

The Board at the Mohave Valley Irrigation and Drainage District (MVIDD) appears to have presented its ICS Exhibit as a mechanism to create ICS and then to transfer that ICS at some later date away from Arizona's River Communities. As you know, this Board of Supervisors (the Board of Mohave County) has opposed such transfers because the water MVIDD now uses is part of the 164,652 acre-feet of 4th Priority water reserved to the River Communities on the Mainstream of the River in Arizona. This Board has consistently opposed such transfers before the CAWCD Board regarding the WAM purchase dating to 2017, before the Department in the Quartzsite Lease matter in 2017 and 2018, and before the MVIDD Board when it changed its policy on transfers in public meetings held in March and July of 2018.

We believe MVIDD seeks to transfer water away from Mohave County for profit because on July 10, 2017, MVIDD's Board of Directors passed Resolution Number 2018-04, paving the way for a rotational fallowing program that, if approved, will transfer Colorado River water outside the District. MVIDD's decision is in direct contradiction to the District's previous longstanding policy, evidenced by Resolution Number 90-1, forbidding the transfer of Colorado River water out of the District. During the lengthy public discussion of the Resolution change, virtually every speaker in two MVIDD board meetings opposed such a policy change.

Interestingly, the new Resolution provides that water may only be transferred outside the MVIDD boundaries "under a Rotational Land Fallowing Program approved by the District, the State of Arizona, and the United States Department of Interior." Resolution page 1-2.

Your approval, and the Bureau of Reclamation's approval, of the MVIDD ICS Exhibit of December 28, 2018 will authorize MVIDD to transfer water away from the Colorado River Mainstream and thus we oppose that Exhibit as written.

Mohave County believes it would be remiss if it did not state that Mohave County has long had concerns that the MVIDD Board is acting under a conflict of interest under Arizona law when individual members seek to profit from the transfer of the District's water away from the River Communities. Indeed, in April of 2018 the Arizona Attorney General began an inquiry into MVIDD's conflict of interest policies and procedures, and that inquiry became public record when it was reported in the press. That said, we have no objection to the very worthy efforts of the State to provide water behind the Dam and in Lake Mead to protect the River System.

In fact this Board has also offered an alternative to MVIDD. On November 30, 2018 this Board proposed to MVIDD that if MVIDD amends Resolution 2018-04 such that transfers outside of the boundaries of MVIDD are, once again, prohibited, then the Board could support MVIDD's creation of "system conservation water." Mohave County contemplated that land may be fallowed to create "system conservation water" that results in Colorado River Water staying behind Hoover Dam in long term storage to protect Lake Mead. Such an amendment of MVIDD's Resolution 2018-04 would resolve the County's concerns over Resolution 2018-04 and permit individuals to receive compensation for fallowing their lands when the water stays behind the dam in Lake Mead - because such "fallowing" not only has a financial opportunity cost to the farmer, it will also support the Drought Contingency Plan and benefit all of the State of Arizona including those individual taxpayers residing inside MVIDD. MVIDD decided that Mohave County's offer was not worthy of a response.

ICS as a Transfer Mechanism

It appears that MVIDD seeks to use the Exhibit that you may approve to transfer water to Central Arizona, and the Exhibit raises the issue of where will the ICS water go if it ever leaves Lake Mead? The 2007 Guidelines at XI.D.1 state "ICS shall be delivered **to the Contractor that created it** pursuant to both Articles II(B)(2) and II(B)(6) of the Consolidated Decree and Forbearance Agreements." (emphasis added and at page 27 of the printed version). However, the 2007 Guidelines at XI.G.3.B.8 also provide:

8. Extraordinary Conservation ICS from a project within a state may only be **credited to the ICS Account of a Contractor within that state** that has funded or implemented the project creating ICS, or to the ICS Account of a Contractor within the same state as the funding entity and project and with written agreement of the funding entity. (emphasis added and at page 41 of the printed version).

Thus it appears MVIDD can create ICS and then credit that ICS to a contractor in Central Arizona, and that water as ICS then belongs to that contractor for use in Central Arizona – not the Mainstream of the River where it was intended to stay.

Because this ICS Exhibit may be used to transfer water away from the River Communities to Central Arizona, Mohave County opposes it as written and proposes that it be approved only if it contains a strict prohibition on any ICS water ever being transferred away from the River Communities.

Arizona Farmers Do Not Own the Water They Seek to Sell and Transfer as ICS

Mohave County continues to be astonished that the MVIDD believes they can sell Colorado River water for their own private gain when that water is not owned by them. If ICS is created and farmers are paid to fallow their land, who owns that water? Does the District control that ICS because the District is the Contract holder? Will the farmers receive all the funds paid by someone to create ICS? How will the District itself and its 16,000 district taxpayers be compensated?

Since 2005, it has been clear law in Arizona that individual farmers do not own, and do not have vested rights in, 4th Priority Colorado River water. Individual Board members and farmers in MVIDD do not own the water they use by contract from MVIDD, and those farmers cannot sell that water to anyone else. As you know, Mohave County will oppose transfers by MVIDD of ICS away from the River by all means, in all forums, for as long as it takes.

In *Maricopa-Stanfield v. Robertson*, 123 P.3d 1122, 211 Ariz. 485 (Ariz., 2005), individual agricultural landowners asserted that they had "vested rights" to Colorado River water in a dispute with their irrigation district. The irrigation district responded that the district has the rights to the water because the district had the sub-contract for the water from the Central Arizona Water Conservation District (CAWCD or CAP), and that CAP had the "master contract" with the United States Department of the Interior and, thus, the landowners had no rights to the water. The Arizona Supreme Court ruled for the district:

"The water is the subject of a master contract between the United States and the Central Arizona Water Conservation District (CAWCD) and related subcontracts between these entities and the two petitioner irrigation districts. The landowners are not parties to these agreements. Because we hold that the landowners do not have vested rights to the CAP water in question, we vacate the trial court's contrary ruling and remand this case for entry of judgment in favor of the districts." *Robertson* at ¶1.

The ruling in *Robertson* that individual landowners do not have vested rights in Colorado River water is clear because the Boulder Canyon Project Act (BCPA) in Section 5 states "that 'no person shall have or be entitled to have the use' of such water except by a contract with the Secretary". *Robertson* at ¶11.

Mohave County continues to oppose the movement by MVIDD of water by any means away from the River.

The Exhibit Purports to Deny Water for Additional Agriculture Purposes in Mohave County

On page 2 of the Exhibit the proposal is made to deny water to MVIDD members that would like to expand their use of water for agricultural purposes. The exhibit states:

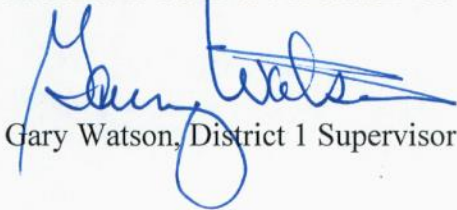
- During the term of the program, there shall be no net increase of agricultural water entitlements within MVIDD.
- Any land enrolled in the program will not be allowed to "overrun" any agricultural water entitlement remaining on the non-fallowed land.

Mohave County has acquired farm land inside MVIDD and wishes to continue farming that land so that the citizens of Mohave County have a voice in MVIDD governance, and so the family farming that land today is not cut off from the land. To accomplish these goals, Mohave County has petitioned MVIDD for about 60 acre feet of additional water to continue farming this parcel. This provision of the Exhibit appears to prohibit any new agricultural uses of water, and it does not appear to be necessary to the creation of ICS. It appears to be an attempt to bind the free market, and should be clarified or removed. If water becomes available within the district, land owners should be free to petition for water and put it to use for agricultural purposes.

I want to thank you for the opportunity to comment on this important Exhibit and DCP process.

Sincerely,

MOHAVE COUNTY BOARD OF SUPERVISORS

A handwritten signature in blue ink, appearing to read "Gary Watson", is written over the printed name.

Gary Watson, District 1 Supervisor

cc: Mohave County Board of Supervisors

Exhibit _____

Mohave Valley Irrigation and Drainage District (MVIDD) Extraordinary Conservation Intentionally Created Surplus (ICS)

Land Fallowing Program

ICS Category: 2.1 A - Extraordinary Conservation ICS - Fallowing of land.

Term: 2019 through 2026

Project Description: Mohave Valley Irrigation and Drainage District (MVIDD) is an irrigation district formed under Title 48, Ch. 19, Arizona Revised Statutes. MVIDD holds a contract with the United States Bureau of Reclamation (USBR) issued under Section 5 of the Boulder Canyon Project Act of 1928, (USBR Contract No. 14-06-W-204) in the amount of 41,000 acre feet annually, and also holds a supplemental contract for use of Colorado River water through the Mohave County Water Authority (Contract No. 09-101) in the amount of 1,250 acre feet annually. MVIDD's exterior boundaries include lands that are part of the Fort Mohave Indian Reservation. MVIDD does not deliver water to those lands. All references to MVIDD and MVIDD water use described here are solely for non-Indian lands within MVIDD.

This project will conserve water by reducing the consumptive use of Colorado River water within MVIDD by fallowing MVIDD agricultural lands with a recent history of irrigation. The program is intended to coordinate with the State of Arizona's Drought Contingency Planning program (DCP).

Annual ICS Creation Amount: The program will yield up to 10,000 acre-feet of conserved water per year.

Administration: MVIDD will undertake to administer the program at the local level, including preparation of necessary enrollment documents, scheduling of annual participation quantities, verification of compliance, impact mitigation, and overall reporting to USBR.

MVIDD will obtain necessary permission to lock out any gates for participating fields as needed. In the case of shared gates, a physical obstruction will separate the fallowed fields and prevent delivery of water.

Enrollment: The fallowing program participants will consist of owners of agricultural land within MVIDD. An enrollment process will be created whereby participating farmers will

voluntarily agree to limit planting of crops on land that has been verified as actively cultivated (or enrolled and fallowed) in the last 3 of the last 5 years. To make participation equitably available, the minimum number of acres will be small, approximately 10-15 acres. Only ½ (50%) of enrolled lands will be eligible for fallowing in any year, and requirements will be imposed to require rotation of planted crops among the enrolled acres at least every three years. Enrollment will remain open, allowing lands to enroll or de-enroll during the program.

Quantification Methodology: Conserved water yield for fallowed fields will be based on a study of consumptive use of crops planted on the agricultural lands enrolled in the program averaged over three of the last five year's water use and crop history, after eliminating the high and low year.

Once identified, enrolled field locations will be assigned a consumptive use value based on the average identified above. When those fields are rotationally fallowed, the consumptive use value of the water not delivered shall be reported as conserved water throughout the term.

All fields within MVIDD have metered water delivery systems, and those systems will be checked and verified by MVIDD during the year to insure that water is not delivered to any farm in excess of the water allocated to the non-fallowed portion of the farm.

Verification Methodology: MVIDD staff will monitor fields throughout the year to verify water is not being used on fallowed lands. In addition to MVIDD verification, USBR may conduct an independent annual verification. MVIDD will also monitor total water use within each farm to insure that remaining water use allocation for the enrolled but not rotationally fallowed lands has not been exceeded.

Limitations on the ICS Creation Amount: To provide assurance that water conserved by active fallowing of agricultural lands will result in a reduction of agricultural consumptive use within MVIDD, MVIDD will administer the following safeguards:

- During the term of the program, there shall be no net increase of agricultural water entitlements within MVIDD.
- Any land enrolled in the program will not be allowed to "overrun" any agricultural water entitlement remaining on the non-fallowed land.

Certification: MVIDD will submit an ICS Certification Report as required by Section XI.G.3.D.1 of the 2007 Colorado River Interim Guidelines, reporting the amount of ICS created under this Exhibit and that the creation was consistent with an approved ICS Plan, this Exhibit, and a Delivery Agreement.

MVIDD acknowledges that, in accordance with Section 2.5.B of the Forbearance Agreement, the Secretary shall verify information in a Certification Report in consultation with the Lower Division States, and provide a final written decision to the Parties.

Delivery: MVIDD shall, if required, enter into a separate delivery agreement for ICS consistent with Article XI.B of the 2007 Colorado River Interim Guidelines.

Approvals:

In Witness of this Exhibit XX to the Forbearance Agreement executed contemporaneously herewith the Parties affix their official signatures below, acknowledging approval of this document on the XX day of XX.

Mohave Valley Irrigation & Drainage District

By: _____

Charles B. Sherrill Jr., Chairman

Attest: _____

Perry Muscelli, Secretary

Approved as to Form:

Michael J. Pearce, District Counsel